Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for	)	WC Docket No. 07-135
Local Exchange Carriers	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

REPLY COMMENTS OF PAETEC HOLDING CORP., MPOWER COMMUNICATIONS CORP., U.S. TELEPACIFIC CORP., RCN TELECOM SERVICES, LLC, AND TDS METROCOM, LLC

May 23, 2011

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EXECUTIVE SUMMARY

The record rebuts the Notice's assumption that TDM intercarrier compensation rates are delaying the move to IP-IP interconnection. Competitive carriers, both wireline and cable, uniformly agreed that the single most important action the Commission could take to promote the transition to IP networks is to make clear IP-IP interconnection is subject to sections 251 and 252 and supported their arguments with detailed legal analyses.

In contrast, the RBOCs provided no legal analysis to justify letting the market govern rates and terms for IP-IP interconnection. AT&T, for example, never explains the legal basis for limiting an incumbents' section 251(b)(5) and 251(c)(2) duties to "circuit-switched" telecommunications and interconnection. The local competition provisions of the Act are technologically neutral and recognize that the public switched telephone network ("PSTN") will evolve over time. Relying on the "market" to regulate IP-IP interconnection for the exchange of voice traffic presents a very real threat that the ubiquity and reliability of the nation's public telecommunications network will be compromised. The Commission should affirm that IP-IP interconnection is technically feasible and incumbents are required to modify their networks, if necessary, to offer it at cost-based rates under sections 251 and 252 of the Act.

Facilities-based CLECs agree with the numerous parties that argue against a very low or zero uniform rate for all terminating compensation. Such a low rate violates the Act and will perpetuate arbitrage opportunities, place large financial demands on consumers and universal service funding, and threaten continued carrier and private investment in telecommunications networks. The facts show that bill-and-keep is the exception, not the default, mechanism governing the exchange of Internet traffic. Legal analysis shows that the Act's pricing standards cannot be read to support bill and keep absent factual findings that traffic is substantially in balance or LECs incur no additional costs to terminate traffic. Neither finding is possible on the record in this proceeding. Because the "free-market" Internet peering model and the Act do not provide for settlement-free interconnection unless traffic is in balance, the Commission should not and cannot mandate bill-and-keep for voice traffic, whether it is exchanged in TDM or IP.

Expanding the subcategories of telecommunications that are subject to a very low or zero rate (or a faster transition period) would perpetuate, if not increase, arbitrage. As Facilities-based CLECs and others argued in Section XV comments, there is no practical way to segregate VoIP traffic from all other traffic to impose a special rate. Similarly, there is no practical way to identify and/or segregate "single rate" traffic from local/toll rate traffic. The Commission should decline invitations to further complicate the task of parsing telecommunications into arbitrary buckets for the purpose of applying special rates with no basis in cost.

The Commission should reject AT&T's and Sprint's proposal to unify all intrastate and interstate access rates on January 1, 2012 because such a flash-cut could have disastrous consequences if implemented industry-wide. For carriers and states that wish to equalize rates on a faster timetable, Facilities-based CLECs and the State Members of the Joint Board proposed self-election mechanisms that would permit each carrier/state to make that choice based on its individual circumstances. Together, a default measured glide path and these self-election mechanisms would achieve the Commission's goals of harmonizing rates, minimizing disruption to service providers, and minimizing the impact on the size of the universal service fund.

Although the State Members' plan would streamline determination of the unitary rate, it has the disadvantage of relying on current access rates, many of which have no relation to cost. Facilities-based CLECs[1] believe that setting the unified rate based on the TELRIC standard established by the Commission would be consistent with the Act and also more likely to end arbitrage opportunities that arise from above- (or below-) cost rates. The Commission may wish to consider some combination of the two methodologies, however, to gain the advantages of both. For instance, a state/carrier electing the unified rate could start charging the capped rate proposed by the State Members immediately upon election, but be required to submit a cost study for the state's review to set the final unified rate.

The Act grants the Commission and state commissions parallel jurisdiction under sections 251 and 252 over both intrastate and *interstate* matters. To the extent the transport and termination of telecommunications is inseverable, and the national policy requires a uniform rate, Congress granted state commissions the jurisdiction to set that rate and limited the Commission's role to establishing the methodology for calculating such rate. Although a below-cost unitary rate is bad for the industry, consumers, and the universal service fund, Facilities-based CLECs agree that the right unitary rate is a worthy goal for long-term intercarrier compensation reform.

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[1] RCN Telecom Services, LLC does not join in this section of the Reply Comments.

EXECUTIVE SUMMARY
(continued)

Specifically, each carrier should ultimately offer a uniform termination rate, but not all carriers should be required to offer the same rate. This does not require that state commissions review cost studies for each LEC operating in their state. Rather, each state commission could adopt benchmarks for different classes of carriers based on the TELRIC cost studies it has reviewed to date, or new studies it could require as part of a cost proceeding to update such rates.

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MAY 23RD REPLY COMMENTS

PAETEC Holding Corp. (on behalf of its operating subsidiaries PAETEC Communications, Inc., McLeodUSA Telecommunications Services, L.L.C., and the common carrier operating subsidiaries of US LEC L.L.C. and Cavalier Telephone) (jointly, "PAETEC"), Mpower Communications Corp. and U.S. TelePacific Corp., each d/b/a TelePacific Communications, RCN Telecom Services, LLC,[2] and TDS Metrocom, LLC (together, "Facilities-Based CLECs" or "the CLECs") file these reply comments on the Federal Communication Commission's ("FCC's") Notice of Proposed Rulemaking ("NPRM").[3]

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[2] RCN Telecom Services, LLC does not join in Section III.C.1 of these Reply Comments.

[3] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.,* WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No.

I. IP INTERCONNECTION

A. Because the Record Shows Movement to IP-IP Interconnection Is Being Stalled by Legal Uncertainty Rather than Intercarrier Compensation Rates, the Commission Should Affirm Incumbents' Duty to offer IP-IP Interconnection under Sections 251/252.

Competitive carriers, both wireline and cable, uniformly agreed that the single most important action the Commission could take to promote the transition to IP networks is to make clear IP-IP interconnection is subject to sections 251/252.[4] The need for Commission affirmation of this obligation is confirmed by the RBOCs' calls for a "free-market end state" that eliminates existing regulatory mechanisms altogether,[5] IP interconnection that is implemented by "negotiated commercial agreements" and "governed by the competitive market,"[6] and no Commission action to "force LECs to accept traffic in IP now or during any transitional ICC regime."[7]

Other Commenters, including the State Members of the Joint Board, NECA et al., and NASUCA, questioned the NPRM's premise that TDM intercarrier compensation is impeding the deployment of IP network architecture.[8] As NASUCA argued, the NPRM lacks proof to support the assumption that the current access regime over compensates certain recipients, thus resulting

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09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 8, 2011) ("NPRM").

[4] CompTel, at 35; Cox, at 18; EarthLink, at 6-7; Facilities-based CLECs, i, 3-4; Time Warner Cable, at 12-13; XO, at 20.

[5] AT&T, at 16-17.

[6] Verizon, at 16.

[7] CenturyLink, at 73.

[8] State Members, at 152; NECA et al, at n.54; NASUCA, at 88-90.

in no incentive to invest in IP-based platforms.[9] Contrary to the NPRM's assumption, the State Members observe that "many more rural LECs seem to have deployed soft switches than have major incumbent carriers."[10] Approximately 19 percent of host switches in NECA's traffic sensitive pool have been replaced by soft switches.[11] A rural LEC consultant confirmed that many of its clients have installed soft switches, even though they are not likely to offer direct IP interconnection to those soft switches.[12] In contrast, AT&T has told state commissions that its ILECs have NOT installed soft switches and do not have the capability to offer SIP interconnection.[13] The Ohio Consumers Counsel has argued in its state proceeding that "[a]ccess parity has existed for an extended period for AT&T and other large Ohio ILECs, but unless OCC missed the conversion, these companies continue to provide voice services on a circuit-switched basis."[14] Thus, rural LECs (with higher access charges) have deployed soft switches, while larger ILECs such as AT&T (with comparatively lower access charges) have not. In short, record evidence rebuts the NPRM's assumption that TDM intercarrier compensation rates are delaying the move to IP-IP interconnection.

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[9] NASUCA, at 89-90.

[10] State Members, at 152-153.

[11] NECA et al, at n. 54.

[12] TCA April 1 Comments, at 2.

[13] *See* Affidavit of Joseph M. Bailey, Lead Product Marketing Manager - Consumer VoIP for AT&T, Texas PUC Docket No. 26381 (Oct. 21,2010) ("Bailey Aff."), ¶ 7 ("The IP service elements and interconnection to the PSTN for U-verse Voice, are provided by SBC Internet Services (d/b/a AT&T Internet Services (ATTIS)), an AT&T Texas affiliate.") and ¶ 8 (AT&T "is incapable of interconnecting with CLECs using SIP interconnection for the routing of traffic throughout its service territory. In fact, AT&T Texas is incapable of routing even its own customers' U-verse calls but is, instead, dependent on media gateway facilities owned by its affiliate ATTIS."), *appended to* AT&T Texas' Response to Amicus Brief of TW Telecom, Sprint, Cbeyond, and McLeodUSA d/b/a/ Paetec, Texas PUC Docket No, 26381 (Oct. 21, 2010) ("AT&T Tex. Resp."), *available at*: http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/26381_254_678811.PDF.

[14] Reply Comments of the Office of the Ohio Consumers' Counsel, Ohio PUC Case No. 10-2387-TP-COI, at 10 (Jan. 19, 2011), *available at*: 3477f39d-f6f8-477a-9873-95ab5ba6a34d_MEdwards119201141319PM_AccessChg Reply Comments.FINAL.1-19-11.doc.

Although the RBOCs agreed that "TDM networks are increasingly incorporating IP functionality,"[15] no RBOC discussed its IP-IP interconnection offerings or plans. AT&T made clear in a Texas arbitration the true reason its ILECs have failed to upgrade their networks to IP architecture. There, AT&T argued that "it is doubtful that incumbent LECs like AT&T Texas will be forced to provide interconnection via SIP" and that the question of how to transition from a circuit-switched to packet-switched network architecture is "for the Congress and the FCC."[16] AT&T has deployed soft switches in its unregulated affiliates, instead of its ILECs, and used this corporate shell game in an attempt to avoid any obligation to offer IP interconnection to requesting carriers. Facilities-based CLECs agree with COMPTEL that the Commission should promptly put a stop to this by invoking the D.C. Circuit's ruling that a RBOC may not avoid its section 251(c) obligations by shielding certain operations in a wholly-owned affiliate.[17]

In addition, Facilities-based CLECs and others provided detailed legal analyses explaining that the Act requires ILECs to make affirmative modifications to their networks where a requesting carrier seeks a technically feasible form of interconnection.[18] IP-IP interconnection for the exchange of voice traffic is technically feasible. Although the RBOCs do not admit to offering it,[19] they admit that their affiliates do. Competitive providers that switch TDM and IP-originated voice traffic, including Neutral Tandem and Hypercube, also offer direct

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15 CenturyLink, at 54.

16 AT&T Tex. Resp., at 3-4.

17 COMPTEL, at 7-8.

18 Facilities-based CLECs, at 5-8.

19 EarthLink cites a BellSouth tariff that offers IP interconnection to interexchange carriers and a Verizon notice of IP interconnection availability that was later withdrawn. EarthLink, at 5 & n.9.

IP interconnection.[20] Thus, the record clearly demonstrates the technical feasibility of IP to IP interconnection, and because it is so, that the Commission should clearly state that ILECs are required to modify their networks, if necessary, and offer IP to IP interconnection to any requesting carrier at cost-based rates under the purview of sections 251 and 252 obligations of the Act.[21]

B. ILEC Proposals for "Market-based" IP Interconnection Violate the Act

1. ILECs Provide No Legal Analysis to Support their Market-based Peering Proposal for IP-IP Interconnection

The Commission should reject the RBOC proposals for free-market IP-IP interconnection based solely on the fact that they ignored the Act completely.[22] In contrast to Facilities-based CLECs' detailed analysis of how and why IP interconnection is technically feasible and required under section 251/252,[23] neither AT&T, Verizon nor CenturyLink provided a legal analysis to support their proposal that the market, rather than regulation, should govern rates and terms for

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[20] Neutral Tandem, at 5; Hypercube April 1 Comments, at 2.

[21] Many parties agreed that the terms and conditions currently applicable to TDM interconnection may not be appropriate for direct IP interconnection. For example, EarthLink, Level 3, Sprint and XO all argued that fewer POIs will be needed in IP-IP interconnection, and that requiring one POI per LATA would be inefficient. EarthLink, at 9 (carriers may prefer one POI per state); Level 3, at 11-13 (FCC should maintain single POI per LATA as default for five years, set default at one POI per state at end of five years); Sprint, at 25 (would not be efficient to have 160 broadband POIs (one per LATA) or even 50 POIs (one per State); XO, at 31 (default of no more than on POI per state but encourage regional POIs). Even CenturyLink agreed that a different POI framework would be desirable in all-IP network, likely with fewer, more geographically dispersed POIs. CenturyLink, at 73. As such, the FCC should permit carriers to gain experience with IP interconnection using state arbitration as a backstop and wait for industry standards and other bodies to make recommendations concerning IP interconnection. *See, e.g.*, Sprint Comments, at 22-23 (FCC should refer to the Technological Advisory Council ("TAC") certain issues regarding IP interconnection).

[22] If RBOCs produce the missing legal analysis in their Reply comments, the other parties should be provided an opportunity to respond. The Commission should not tolerate withholding arguments until Reply comments, especially when it expressly advised parties to provide such analysis.

[23] Facilities-based CLECs, at 4-8. *See also* COMPTEL, at 5-8; EarthLink, at 3-9.

IP-IP interconnection.[24] AT&T even proposed to sunset the section 251/252 requirements for *legacy TDM-based* services on Jan. 1, 2017, again with no legal analysis supporting its position that the Commission can ignore the Act.[25] The record makes clear that RBOCs will not voluntarily offer IP-IP interconnection.[26] The Commission must affirm their duty to do so in order to remove this anti-competitive roadblock that is preventing transition of the PSTN from TDM to IP technology.

2. Use of Packet Switching or IP Technology Does not Absolve ILECs of Their Section 251/252 Duties

Although the Act is not a model of clarity, any interpretation that its requirements are limited to TDM, circuit-switched technology would conflict with the text and be arbitrary and capricious. Implicit in RBOC arguments for market-based IP interconnection is an assumption that the Act grants the Commission authority to regulate TDM technology but not IP technology.[27] This narrow view is not supported by the language in the Act, and indeed, is contradicted by its plain language .

The local competition provisions of the Act are technologically neutral and recognize that the public switched telephone network ("PSTN") will evolve over time. Indeed, the Commission

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[24] AT&T, 16-30; CenturyLink, at iv; Verizon, at 16.

[25] AT&T, at 32. At a minimum, the FCC would need to conduct a forbearance analysis to adopt AT&T's TDM sunset proposal. AT&T neither sought such forbearance nor attempted to meet the burden of proof required for such forbearance.

[26] IP to IP interconnection joins a list of 1996 Act obligations that the RBOCs have refused to voluntarily offer to competitors in accordance with the terms of the Act. One of the more recent examples is the CLEC request for the FCC to adopt a pricing methodology for 271 Network Elements that the RBOCs have simply refused to offer despite the existence of the obligation since passage of the Act. Clearly, the FCC will have to direct the RBOCS to enter into such agreements before any progress is made towards IP to IP interconnection.

[27] *See, e.g.*, AT&T at 37-38 (section 251(b)(5) grants FCC authority over all classes of telecommunications traffic that terminates on the "circuit-switched" PSTN); AT&T at 39 (transport and termination of telecommunications that involves one "circuit-switched" telecommunications carrier).

found that "all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise."[28] Incumbents are required to offer interconnection with their local exchange carrier "network," not their circuit-switched network, for the transmission and routing of telephone exchange service.[29] Telephone exchange service includes both service within a telephone exchange covered by the exchange service charge and "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[30] Telecommunications service is defined as the offering of telecommunications for a fee, "regardless of the facilities used."[31] By incorporating the concept of comparable service and recognizing that the Act's defined terms are not tied to a specific type of facility or network, Congress made clear that an incumbents' interconnection obligation is technologically neutral.

The reciprocal compensation obligation in 251(b)(5) is similarly broad enough to include telecommunications exchanged with LECs regardless of the switching protocol. AT&T contradicts itself when it argues that section 251(b)(5) is broad enough to cover the exchange of all traffic (local, toll, intrastate, interstate) for all services (exchange access, information access, or exchange service), but at the same time claims 251(b)(5) is limited to "circuit-switched" telecommunications.[32] AT&T cannot have it both ways. Because section 251(b)(5) is broad and

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[28] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd. 15,499, 16055, at ¶ 993 (Aug. 8, 1996) ("First Local Competition Order").

[29] 47 U.S.C. § 251(c)(2).

[30] 47 U.S.C. § 153(47).

[31] 47 U.S.C. § 153(46).

[32] AT&T, at 39.

all-encompassing, there is no rational argument for excluding telecommunications exchanged in IP. Indeed, AT&T never explains the legal basis for limiting an incumbents' section 251 duties by inserting the term "circuit-switched," which does not appear in that section or 252. Given the utter lack of legal authority for AT&T's position, the Commission should reject it. Networks that use IP protocol are not excluded from section 251/252 requirements and, therefore, the Act entitles carriers to negotiate one interconnection agreement with the ILEC subject to the 251/252 construct to govern the exchange of all telecommunications traffic, regardless of the protocol used.[33]

Subjecting incumbents' IP-based networks to section 251(c)(2) interconnection and 251(b)(5) compensation obligations does not raise the same concerns that led the Commission to deny unbundled access to incumbents' packet switching and next generation loop facilities. First, as Facilities-based CLECs showed in initial comments, the impairment analysis the Commission used to justify restricting access to UNEs does not apply to incumbents' interconnection obligations.[34] Second, denying competitors interconnection with incumbents' IP-based networks would undermine the very ubiquity of the public voice network. With respect to next-generation loop facilities, the Commission found that denying competitors unbundled access to such facilities would stimulate network investment by incumbents and competitors alike, alternative loop facilities were available to competitors, and cable companies had made inroads to develop mass market intermodal competition.[35] In contrast, if incumbents have no

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[33] Ohio PUC, at 63.

[34] Facilities-based CLECs, at 8.

[35] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and

regulatory obligation to offer interconnection to their IP networks and are free to refuse direct interconnection and/or impose exorbitant rates for such interconnection, competitors will have no alternative to exchange calls with the incumbents' customers. In short, competitors will face the prospect of their customers being unable to reach customers of their largest competitors.

The availability of transit competition will not be enough to ensure that all calls are completed in the absence of a duty to interconnect IP networks for the exchange of voice telecommunications. As Sprint explained:

> Because every telephone number is tied to only one service provider, an originating IP network can complete its customers' call attempts only by sending its traffic to the network serving the dialed number. In other words, the "terminating access monopoly problem" that the Commission has recognized in the context of PSTN traffic does not disappear simply because network operators begin exchanging voice traffic using IP rather than TDM technologies. And, with this monopoly, terminating carriers (and incumbent LECs in particular) have both the incentive and ability to impose unreasonable terms as a precondition to supporting interconnection.[36]

Although the RBOCs claim that transit offerings will ensure terminating providers are not able to demand exorbitant rates, the current dispute between Level 3 and Comcast presages the fallacy of that claim. Level 3 has alleged that Comcast, the terminating provider, is demanding excessive rates for delivering traffic to its subscribers, notwithstanding Level 3's willingness to deliver traffic deep within Comcast's network.[37] AT&T and Verizon are two of the most vocal

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Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 290-292 (2003) (subsequent history omitted) ("*TRO*"). Indeed, recent economic analysis suggests that the Commission's underlying premise that limiting access to ILEC next generation facilities did not, in fact, stimulate investment in next generation loops by either ILECs or competitive LECs used to serve business customers. *See* Lee L. Selwyn & Helen E. Golding, Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet, 63 Fed. Comm. L.J. 91, 129-131 (2010).

[36] Sprint, at 19.

[37] *See* Letter from John M. Ryan to Marlene H. Dortch, GN Docket 09-091, at 1 (Feb. 22, 2011) (explaining Comcast refused to exchange traffic with Level 3 at local interconnection points where the substantial majority of Comcast's ISP customers reside)

advocates that the Commission and state commissions must cap competitive LEC switched access rates based on the argument that CLECs have a monopoly on traffic terminating to each end user such that the "market" cannot regulate CLEC access rates. That position cannot be squared with the claim that there is a market that can adequately regulate terminating IP traffic.

Applying the Internet paid peering model to voice delivered over IP interconnections threatens to undermine the central tenant of a public voice network, namely that any customer on the network can reach any other customer. As the Commission found in 2007, "[b]ecause the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the explicit goals of the Communications Act of 1934... Commission precedent does not permit unreasonable call blocking by carriers."[38] Yet numerous examples show that traffic can be blocked and customers prohibited from reaching customers on other networks under the Internet's paid peering model. Cogent has been the most public about service disruptions that cut off service to its or others' Internet access subscribers. For example, in 2008 Sprint severed its peering connection with Cogent, resulting in some Cogent end users being unable to connect to Sprint websites.[39] Earlier that same year Cogent cut off connections with Telia Sonea, resulting in some European end users being unable to reach websites served by Cogent.[40] Likewise, the Commission had to step in to ensure that Madison River did not continue to block

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[38] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, DA 07-2863, ¶ 1 (Chief, Wireline Comp. Bur., rel. June 28, 2007) (citations omitted).

[39] Sprint Cuts of 'Net to Cogent Cites, Oct. 31, 2008, available at http://www.pcmag.com/article2/0,2817,2333750,00.asp.

[40] Telia Resolves Internet Dispute, March 30, 2008, available at http://www.thelocal.se/10786/20080330/#.

calls placed by VoIP subscribers.[41] Relying on the "market" to regulate IP-IP interconnection for the exchange of voice traffic presents a very real threat that the ubiquity and reliability of the nation's public telecommunications network will be compromised. Moreover, the pro-competitive goals of the 96 Act will be severely compromised as competitors will be beholden to the unrestrained market power of their largest competitors as to what it will cost to terminate IP traffic to end users served by the ILEC or its affiliates.

3. Section 251(a)(1) Interconnection Is not a Sufficient Regulatory Backstop

Google and Public Knowledge suggested, respectively, that broadband service providers have a duty to interconnect under 251(a)(1) and the Commission should assert jurisdiction over traffic exchange, but keep its powers in reserve.[42] Facilities-based CLECs urge the Commission not to rely on sections 251(a)(1) or 201(a) as the regulatory backstop for IP-IP interconnection.

Although section 251(a)(1) requires all telecommunications carriers to interconnect, it permits direct or indirect interconnection. Facilities-based CLECs agree with AT&T's comments in another docket that "[t]he only interpretation of § 251(a)(1) that is consistent with [the] Act and promotes efficient interconnection is that originating carriers are entitled to choose whether to interconnect directly or indirectly with terminating carriers."[43] Yet courts and state commissions interpreting the section 251(a)(1) duty have found that connection to the PSTN satisfies this duty. Incumbents have relied on this availability of indirect PSTN interconnection

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[41] FCC Chairman Michael K. Powell Commends Swift Action to Protect Internet Voice Services, News Release (March 3, 2005) (attaching consent decree). *See also Madison River Communications, LLC and affiliated companies*, Order, DA 05-543 (Chief, Enforcement Bur., March 3, 2005) (Madison River Communications, LLC, its parent company, and affiliates waived any objection to the authority of the Bureau and agreed not to block ports used to access VoIP applications).

[42] Google, at 10-11; Public Knowledge, at 28.

[43] AT&T Reply Comments in WC Docket No. 06-159, at 3 (filed Sept. 25, 2006).

to deny numerous requests for direct interconnection. For example, the Maine Public Utilities Commission has argued that

> the five Maine rural ILECs already comply with their Section 251(a)(1) interconnection duty by connecting to the public switched telephone network (PSTN) and by not blocking the traffic to or from other telecommunications carriers. Although that kind of connection may not provide CRC with 'direct' connection to the facilities of the five Maine rural ILECs, it does provide indirect connection, and that is all that is required by Section 251(a)(1).[44]

Making IP-IP interconnection subject only to section 251(a)(1) runs the risk that providers with market power will deny direct interconnection to all but a few "peers." Certain market participants may not find a provider willing to offer them PSTN interconnection, especially if incumbents are not required to offer transit services.

Section 251(a)(1) interconnection also is not clearly included within section 252 negotiation and arbitration rights. Incumbents have used this ambiguity to deny requesting carriers a regulatory forum to seek direct interconnection. As the Maine Commission found, "a state commission is without authority to enforce directly the requirements of §251(a) and §251(b) as they relate to rural ILECs for whom the rural exemption has not been lifted."[45] Without state commission involvement in interconnection disputes, the Commission could be forced to be the arbiter of such disputes under section 201(a). As the Public Utilities Commission of Ohio ("Ohio PUC") explained, if the state section 252 arbitration "process had not been in place, the FCC and the courts would have been overwhelmed with complaints and

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44 Maine Public Utilities Commission Comments in WC Docket 10-143, at 8 (Aug. 31, 2010).

45 CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 251, 252, Order, No. 2007-611, 14 (ME PUC May 5, 2008).

litigation that would have taken much longer to resolve. This would have resulted in competitive barriers to new entrants delaying their entrance into the marketplace."[46]

Finally, section 251(a)(1) lacks the detail and standards necessary to establish the framework for IP-IP interconnection. As one U.S. District Court noted, "§ 251(a) and (b) say nothing at all about 'agreements,' 'negotiations,' or 'arbitration,'" and while "there are duties established by § 251(a) and (b), and such duties apply to Brazos [an incumbent LEC]," there is no "language in the Act indicating that these duties independently give rise to a duty to negotiate or to arbitrate."[47] As explained herein, Congress created an interconnection framework that was intended to evolve as technology evolves. The Commission should update its rules implementing the Congressional section 251(c)252 framework rather than attempting to create a new framework from scratch.

4. ILEC-provided Transit Is Subject to Sections 251 and 252

Facilities-based CLECs agree with the numerous commenters that urged the Commission to affirm that transit provided by ILECs is subject to sections 251 and 252.[48] Section 251(c)(2), which requires incumbent LECs to interconnect for the "transmission and routing of telephone exchange service" includes a duty to provide transit because the ILECs is transmitting and routing the requesting carrier's telephone exchange service. The fact that such interconnection is *with the incumbent's network* does not limit the use of such interconnection solely to the exchange of traffic *with the incumbents' end users*. As one U.S. District court found, "[a] plain

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[46] Ohio PUC, at 64.

[47] *Sprint Communications Company v. Public Utilities Commission of Texas and Brazos Telephone Cooperative*, No. A-06-CA-065-SS, 2006 U.S. Dist. LEXIS 96569, *16 (W.D. Tex. Aug. 14, 2006).

[48] Cox, at 16; Cbeyond et al, at 21-22; Charter, at 9, 11-12; Ohio PUC, at 69-70.

reading of the regulation does not require that there be the mutual exchange of traffic originating within each LEC's network. Rather, the Court reads the language as requiring only that the physical link between the LECs be capable of the mutual exchange of traffic."[49] As the Commission found:

> telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements.[50]

Similarly, once a requesting carrier obtains interconnection to the incumbent's network for the exchange of traffic with the incumbents' end users, it should be permitted to use such interconnection for transit to other providers connected to the incumbents' network. Indeed, if section 251(c)(2) did not impose a transit duty on incumbents, the "option" provided by section 251(a) would be meaningless without transit. A terminating carrier could refuse direct interconnection and, without transit offered by incumbents, the originating carrier would not be able to interconnect indirectly.

Facilities-based CLECs also agree with the Ohio PUC that the existence of transit competition in some markets does not obviate the needs for transit terms and conditions to be

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[49] *Southern New England Tel. Co. v. Perlermino*, 2011 U.S. District LEXIS 48773, *16-17 (D. Conn.).

[50] *First Local Competition Order*, 11 FCC Rcd 16055 at ¶ 995.

included in interconnection agreements subject to state approval.[51] RBOCs have been aggressive in requiring CLECs to execute so-called "commercial agreements" for transit services notwithstanding the state commission decisions that have found sections 251 and 252 impose on ILECs an obligation to offer transit services. AT&T, for example, routinely files such commercial agreements with the Commission with rates that not only exceed the TELRIC rates set by state commissions, but also vary depending on the carrier seeking transit service. For example, Michigan has required AT&T to offer transit service in interconnection agreements[52] and set a TELRIC transit rate of $0.000454 (assuming one mile of transport).[53] Yet AT&T has filed with the Commission commercial agreements for transit in Michigan at a rate of $0.006731 per MOU (where the carrier transits more than 20,000,000 MOU per month), almost 15 times the TELRIC rate. As shown in Exhibit A, the transit rates AT&T includes in commercial agreements vary depending on the party, with some parties getting lower rates for higher volumes and other parties getting higher rates for higher volumes.

The Commission should affirm incumbents' duty to offer transit service under section 251 and 252 and direct AT&T (and other RBOCs that require such agreements but do not file them with the Commission) to submit transit agreements with state commissions who can

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[51] Ohio PUC, at 70.

[52] *Mich Bell Tel. Co. v. Chappelle*, 222 F.Supp.2d 905, 907 (D. Mich 2002) (finding federal law does not preclude mandatory transiting and Michigan is permitted to impose this additional pro-competitive condition under state law), *aff'd Mich. Bell Tel. Co. v. Chappelle*, 93 Fed. Appx. 799 (6th Cir. 2004).

[53] *In the matter, on the Commission's own motion, to review the costs of telecommunications services provided by SBC Michigan*, Case No. U-13531, Opinion and Order, at 11 (Mich. P.S.C., Jan. 25, 2005).

evaluate them and determine whether AT&T's differing rates for such "voluntary" agreements discriminate against a carrier not a party to the agreement.[54]

II. RATE LEVEL

Facilities-based CLECs agree with the State Members of the Joint Board that the "benefits of low intercarrier compensation rates must be balanced against other objectives, and it is not possible to ignore the large financial demand that intercarrier compensation reform will necessarily place on universal service funding."[55] As NASUCA noted, reducing intercarrier compensation rates to $0.0007 or nothing would also impose a huge burden on consumers.[56] The Ohio Consumers' Counsel recognized that "bill and keep ultimately results in a solution that, like Sprint's incremental cost proposal, unfairly shifts all joint and common cost recovery to end-users."[57] A TELRIC termination rate, on the other hand, would require wholesale carriers to pay fair rates for their use of other carrier's networks, allocate joint and common costs across all customers (end user and wholesale), minimize the adverse impact on the universal service fund/access recovery mechanism, and diminish incentives for arbitrage. The Commission should reject calls for a uniform low or zero intercarrier compensation rate.

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[54] 47 U.S.C. § 252(e)(2).

[55] State Members, at vii.

[56] NASUCA, at 101 (arguing the Commission should reject the incremental cost standard because it requires high rates for basic retail services).

[57] Ohio Consumers' Counsel Reply Comments, Case No. 10-2387-TP-COI, at 15.

A. The Commission Should Reject Calls for Bill-and-Keep in Both TDM and IP Interconnection Arrangements

Where traffic is substantially in balance[58] and/or the parties voluntarily agree to a terminating rate of zero, bill-and-keep is lawful and appropriate. But that is not the bill-and-keep that parties are advocating in this proceeding. Rather, AT&T, Sprint, and others advocate bill-and-keep regardless of traffic balance. AT&T proposes that "[o]n January 1, 2017, access rates will be fully detariffed, and all government mandated intercarrier compensation obligations will be eliminated (*i.e.*, the default rule for intercarrier compensation on the PSTN *will be bill and keep*)."[59] Sprint advocates the immediate imposition of bill-and-keep on all "packetized" traffic (which Sprint does not define and carriers cannot distinguish from other terminating traffic) and ultimately the imposition of bill-and-keep on all traffic exchanged by the three largest ILECs (Verizon, AT&T, and CenturyLink/Qwest) "and their competitors," which presumably includes all CLECs, after a three year transition period.[60] AT&T goes so far to assert that the Act's pricing standard for the transport and termination of section 251(b)(5) traffic, section 252(d)(2), "permits bill and keep for all traffic, *including unbalanced traffic*."[61] The Commission should reject AT&T and Sprint's proposals because they are inconsistent with market-based Internet peering, the Act, especially the statutory pricing standards embodied in section 252(d)(2), and the Act's legislative history.

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58 *See, e.g.,* 47 C.F.R. § 51.713(b) ("A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b).").

59 AT&T, at 31 (emphasis added).

60 Sprint, at 6-9.

61 AT&T, at 48.

B. The Commission Should not Impose Bill-and-Keep by Regulatory Fiat Because it is the Exception, not the Default, in Internet Traffic Exchange

The facts show that bill-and-keep is the exception, not the default, mechanism governing the exchange of Internet traffic. What AT&T is really proposing is a regime in which only the largest networks exchange traffic with each other under bill-and-keep,[62] and *all other network providers paying the larger networks to both send and receive traffic.* For example, AT&T admits that under paid peering arrangements, some entities providing service to end users must pay the transit provider not only to deliver traffic to other networks, but also to *receive* traffic.[63] Google includes a graphic depiction of the exchange of money in Internet paid peering arrangements which also shows the ISP serving the end users paying the regional network and the regional network paying the backbone provider.[64] This graphic makes clear that the LEC terminating a call does not recover the cost of transporting and terminating on its network calls that originated on another carrier's network. As explained in Section II.C, this violates section 251(b)(5) and 252(d) when applied to telecommunications traffic.

As the State Members of the Joint Board argued, "bill and keep is a special case" that "will arise naturally only if both parties derive approximately equal benefits from the trade."[65] "Indeed, the premise of all the current bill and keep proposals is that regulatory power is

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[62] *See, e.g.*, AT&T Global IP Network Settlement-Free Peering Policy, available at http://www.corp.att.com/peering/ (to peer on AT&T's Internet backbone, a peer "must operate a US-wide IP backbone whose links are primarily OC192 (10 Gbps) or greater."); Verizon Business Policy for Settlement-Free Interconnection with Internet Networks, available at http://www.verizonbusiness.com/terms/peering/ (a Verizon peer should "have a fully redundant backbone network, in which the majority of its inter-hub trunking links shall have a capacity of at least 9953 Mbps (OC-192) for interconnection with Verizon Business-US").

[63] AT&T, at 23.

[64] Google, at 7.

[65] State Members, at 148.

necessary to reach a result that does not arise naturally."[66] Verizon agrees that "networks generally enter into settlement-free arrangements for Internet traffic only where the traffic flows between the networks are roughly in balance" and that where traffic ratios are "significantly asymmetrical, it is common for one provider to pay for the exchange of traffic, either through paid peering or transit."[67]

AT&T's and Verizon's peering policies prove the point that bill-and-keep is the exception and is limited to situations in which traffic is balanced:

- AT&T's "Peer must maintain a balanced traffic ratio between its network and AT&T. In particular, a new peer must have... [n]o more than a 2.00:1 ratio of traffic into AT&T: out of AT&T, on average each month."[68]
- In order to have a settlement-free peering arrangement with Verizon, the "ratio of the aggregate amount of traffic exchanged between the Requester and the Verizon Business Internet Network with which it seeks to interconnect shall be roughly balanced and shall not exceed 1.8:1."[69]

Indeed, TeleGeography concludes that "[o]nly a handful of the world's largest internet service providers are able to exchange all of their traffic via unpaid peering relationships."[70] Because the "free-market" Internet peering model does not provide for settlement-free interconnection absent traffic balances, the Commission should not impose bill-and-keep by regulation for voice traffic, whether such traffic is exchanged in TDM or IP.

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66 *Id.* at 149.

67 Verizon, at 14.

68 AT&T Global IP Network Settlement-Free Peering Policy, available at http://www.corp.att.com/peering/.

69 Verizon Business Policy for Settlement-Free Interconnection with Internet Networks, available at http://www.verizonbusiness.com/terms/peering/.

70 TeleGeography Research, "Global Internet Geography," Executive Summary at 4 (Dec. 2010) *available at*: http://www.telegeography.com/page_attachments/products/website/research-services/global-internet-geography/0001/6811/telegeography-global-internet.pdf

C. The Act Prohibits Imposition of Bill-and-Keep Unless Traffic Is Balanced Or A Carrier Voluntarily Agrees To A Compensation Rate of Zero

Section 252(d)(2) sets forth the pricing standards for "charges for transport and termination of traffic" exchanged with LECs pursuant to section 251(b)(5).[71] Through the section 252(d)(2) pricing standards, the Act assures that the LEC terminating section 251(b)(5) traffic will recover the "costs associated with the transport and termination on [that] carrier's network facilities of calls that originate on the network facilities of the other carrier" from the originating carrier.[72] Thus, the Act contemplates a calling party pays regime and the pricing standards must be read in that context. Further, under the Act's statutory pricing standards, such costs must be determined "*on the basis of a reasonable approximation of the additional costs of terminating such calls*."[73] Based in part on these pricing standards, the Commission required the state commissions to use a "forward-looking economic cost-based methodology" (*i.e.*, TELRIC) to establish the rates for transport and termination of section 251(b)(5) traffic.[74] In the more than fifteen years since passage of the Act, the rates for such transport termination have been set by negotiation of interconnection agreements between the parties and, often, through arbitration before state commissions.[75] Section 252(d)(2) states that any terminating rates that fail to meet

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[71] 47 U.S.C. § 251(b)(5) ("*Each local exchange carrier* has the following duties: . . . The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.").

[72] 47 U.S.C. § 252(d)(2)(A)(i); The Act's statutory pricing standards govern the rates between interconnecting carriers and not rates between a carrier and its end users. 47 C.F.R. § 51.701 ("The provisions of this subpart apply to reciprocal compensation for transport and termination of traffic *between LECs and other telecommunications carriers*.") (emphasis added).

[73] 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added).

[74] First Local Competition Order, 11 FCC Rcd. 15,499, 16023-16025, at ¶¶ 1056, 1058 (Aug. 8, 1996) ("Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present.").

[75] 47 U.S.C. § 252(b).

these pricing standards mandated by section 252(d)(2) cannot be "just and reasonable" as required by the Act.[76] During this entire fifteen year history, bill-and-keep has been viewed by the Commission and state commissions as appropriate only where traffic is balanced between the carriers.

In the First Local Competition Order, the Commission found "that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs"[77] in violation of the Act's statutory pricing standards, let alone the "mutual" and "reciprocal" recovery of costs "on the basis of a reasonable approximation of the additional costs of terminating such calls."[78] The Commission further held that "bill-and-keep arrangements are not economically efficient because they distort carrier's incentives encouraging them to overuse competing carrier's termination facilities."[79] These conclusions have been followed by state commissions in interconnection agreement arbitrations and TELRIC cost proceedings for fifteen years and hold true today.

Section 252(d)(2) states that it should not be read to "preclude arrangements that afford the *mutual recovery of costs* through the *offsetting* of reciprocal obligations, including arrangements that *waive* mutual recovery (such as bill-and-keep arrangements)."[80] However, use of the term "waive" in section 252(d)(2)(A)(i) implies that a terminating carrier has a choice.

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[76] 47 U.S.C. § 252(d)(2)(A).

[77] First Local Competition Order, 11 FCC Rcd. 15,499, 16055, at ¶ 1112 (Aug. 8, 1996) (emphasis in original).

[78] 47 U.S.C. § 252(d)(2)(A) (ii).

[79] First Local Competition Order, 11 FCC Rcd 16055, at ¶ 1112.

[80] 47 U.S.C. § 252(d)(2)(A)(i).

Thus, the Commission or a state commission may not mandate bill-and-keep, as advocated by Sprint and AT&T, where that commission has not first determined that the relative balance of traffic results in the *offsetting* of carrier costs as between the particular carriers. In fact, the Commission concluded that only "*if traffic is relatively balanced in the two directions*" may states impose bill-and-keep.[81] Given the plain text of the statute, the Commission's prior holdings and rules, and fifteen years of practice before state commissions, the Commission would face substantial litigation risks were it to reverse course now on its interpretation of the Section 252(d)(2) pricing standards and mandate bill-and-keep (*i.e.*, a rate of zero) without any regard as to whether traffic is in balance between the carries involved.

AT&T's present advocacy in favor of bill-and-keep stands in stark contrast to the consistent opposition of its component LECs in past proceedings. For example, at the time of the adoption of the First Local Competition Order, many ILECs, including Ameritech and Bell South, which are now part of the reconstituted AT&T, acknowledged that "mandatory bill-and-keep requirements conflict with the 1996 Act."[82] Ameritech, for example, argued: "a waiver is a voluntary relinquishment of rights, section 252(d)(2)(B) in no way authorizes either states or the Commission to mandate an arrangement, such as bill-and-keep, in contravention of the right of each carrier to recover its costs."[83] Bell South argued that "[u]nder the express language of the

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[81] First Local Competition Order, 11 FCC Rcd 16055, at ¶ 1112.

[82] First Local Competition Order, 11 FCC Rcd 16047, ¶ 1100, n.2648; Ameritech Comments, at 78-79; SBC Comments, at 51-52.

[83] *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Comments of Ameritech, CC Docket No. 96-98, at 78-79 (filed on May 16, 1996) ("The reference to 'additional costs' in section 252(d)(2)(A)(ii) guarantees that carriers, at a minimum, recover TSLRIC. If a state were to force parties into bill-and-keep arrangements, it could result in one or more carriers being required to provide service without adequate compensation, which is the equivalent of requiring one carrier to subsidize the services provided by another carrier -- *a result certainly not permitted by the statute*.") (emphasis added).

Act, bill-and-keep arrangements are *only permissible* where the parties voluntarily agree to waive mutual recovery of costs."[84] Thus Bell South agreed with the Facilities-based CLECs' interpretation of the word "waive" in the pricing standards (discussed above) that carriers may waive their right to compensation, but state commissions may not impose a rate of zero.

Some of these ILECs, such as Bell South and Bell Atlantic, went so far as to argue that "mandating these arrangements violates the takings clause of the Fifth Amendment" of the U.S. Constitution.[85] For example, Bell South argued:

> [T]he Commission fails to recognize that any attempt by the commission to mandate bill-and-keep arrangements would constitute a taking without just compensation in violation of the Takings Clause of the Fifth Amendment of the constitution. The requirement that a LEC transport and terminate traffic of another LEC constitutes a physical intrusion into the LEC's property. It is well established that government action, regardless of how small, that requires a property owner to dedicate a portion of its property to use and transmit by others constitutes a taking for Fifth Amendment purposes.[86]

A host of other ILECs also argued mandatory bill-and-keep violated the statutory pricing

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84 *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Comments of BellSouth Corp., CC Docket No. 96-98, at 73, n.145 (filed on May 16, 1996) (emphasis added) ("Further, there is no question that this provision vests the right of waiver of the mutual recovery of costs to parties. The provision is a rule of construction instructing state commissions regarding their review of negotiated agreements") ("Bell South Comments").

85 First Local Competition Order, 11 FCC Rcd 16050, ¶ 1105, n.2676-77 ("Bell South further asserts that bill and keep would lead to no compensation for use of incumbent LEC property and will therefore constitute and uncompensated taking in violation of the Constitution."); Bell South Comments at 74-75; *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Comments of Bell Atlantic Corp., CC Docket No. 96-98, at 41-2 (filed May 16, 1996) ("[B]ecause bill and keep requires LECs to incur the cost of terminating traffic over their networks but precludes them from recovering these costs, a mandated bill and keep arrangement would constitute a taking in violation of the Fifth Amendment.").

86 Bell South Comments, CC Docket No. 96-98, at 74 (filed on May 16, 1996).

standards.[87] SBC Communications, Inc., AT&T's predecessor company, for example, argued:

> with regard to whether bill-and-keep should be or can be mandated, while the Act specifically permits agreements among interconnecting LECs that 'waive mutual recover (such as bill-and-keep arrangements),' *any such arrangement must be the voluntary result of negotiation and the decision of the parties to accept such 'rates.'* Importantly, by inserting the concept of 'waiver' into this area, Congress has clearly prescribed a consensual, wholly voluntary act. Compulsion is antithetical to any concept of waiver.[88]

In these Comments, SBC agrees with the Facilities-based CLEC's view that the Commission cannot mandate bill-and-keep and that the use of the term "waive" implies that carriers have a choice as to whether or not to adopt a rate of zero. Moreover, SBC considers imposing bill-and-keep to be the equivalent of setting a "rate" in these comments, rather than a mere methodology as it argues in its most recent comments on the issue.[89] In addition, U.S. West argued that: "Neither the Commission nor any state commission can mandate bill and keep arrangements without unlawfully taking the property of objecting LECs; or, at a minimum, conducting a proceeding on the record that documents the traffic between LECs is roughly equivalent."[90] The Facilities-based CLECs have not alleged that mandatory bill-and-keep is a taking; however, we maintain that a record demonstrating that traffic is balanced or roughly equivalent is required before bill-and-keep may be adopted.

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87 *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of NYNEX Telephone Co., at 88-9 (filed May 16, 1996) ("However, because 'Bill-and-Keep' denies the LEC its statutory right to the recovery of its costs associated with transport and termination of traffic, such arrangements cannot be lawfully ordered by regulators absent the agreement of the parties. This is evidenced by the language in Section 252(d)(2)(B)(ii) which allows parties to enter into reciprocal compensation arrangements that 'waive' mutual recovery of costs (such as Bill-and-Keep arrangements.").

88 *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of SBC Communications, Inc., at 52 (filed May 16, 1996) (emphasis added).

89 *Id.*

90 *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Comments of US West, Inc., CC Docket No. 96-98, at 70-1 (filed on May 16, 1996).

D. The Commission Would Improperly Set A Rate by Mandating Bill-and-Keep

AT&T attempts to justify a mandatory bill-and-keep regime regardless of whether traffic is balanced or unbalanced by arguing that "[b]ill and keep is a methodology, not a 'rate.'"[91] AT&T asserts that "the end-user recovery approach does not amount to a rate proscription simply because the charge to the carrier under that scheme is zero."[92] Sprint makes a similar argument in its comments.[93] AT&T's and Sprint's argument, while clever, lack merit and are inconsistent with the Act, as confirmed by prior RBOC comments. Even assuming, *arguendo*, that bill-and-keep is a methodology, the Commission cannot adopt it because it is inconsistent with the Act's terms that contemplate a calling party pays system in which the originating carrier pays the terminating carrier for the additional costs of terminating traffic.

AT&T's position is also inconsistent with its arguments in other forums. Although AT&T advocates bill and keep before the Commission, when a CLEC proposed that AT&T Connecticut "should recover nothing for the use of its tandem and end office switches," AT&T responded that such a bill-and-keep regime would be "patently unlawful" and that "[d]enial of all cost recovery... would be confiscatory."[94] Mandatory bill-and-keep obviously sets a rate of zero in violation of the statutory pricing standards and the structure of the Act which leaves setting the actual rate for termination of 251(b)(5) telecommunications to the states.

While the Commission has the authority to establish the methodology for determining

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91 AT&T, at 50.

92 *Id.*

93 Sprint, at B.6 ("Bill-and-keep is a different methodology for mutual recovery of termination costs.").

94 CT AT&T Reply Brief at 25-26.

and constraining the terminating rate; the Supreme Court and the Eighth Circuit Court of Appeals have made clear that state commissions have sole authority to set the actual rates and a rate of zero is unequivocally a rate no matter how AT&T or Sprint attempts to disguise this fact.[95] As the Eighth Circuit observed, section "252(c)(2) requires a state commission to 'establish any rates for interconnection, services [, including termination], or network elements according to'" the section 252(d) pricing standards.[96] Further, the Court held that "the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that *Congress did not envision the FCC's participation in determining the prices*."[97] Accordingly, the Court concluded that "the Act *plainly grants the state commissions, not the FCC*, the authority to determine the rates involved in the implementation of the local competition provisions of the Act."[98] Finally, the Court declared: "we believe that the 1996 Act, when coupled with section 2(b), mandates that the *states have the exclusive authority to establish prices* regarding the local competition provisions of the Act."[99] The Supreme Court likewise held that "[i]t is the states that will apply those [pricing] standards and implement that methodology, determining the concrete result in particular circumstances."[100] In sum, the Eighth Circuit and the Supreme Court have made it clear that the

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[95] Ohio PUC March 31 Comments, at 5, n.11, 8-9 ("actual setting of the rates should be left to the states as mandated by the Act"); Ohio PUC, at 52-53 ("authority for establishing the actual rates is still reserved to the states under section 252 of the Act."); Facilities-based CLECs, at 25-26.

[96] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 7794 (8th Cir. 1997), *rev'd in part and remanded on other grounds*, *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (emphasis added); 47 U.S.C. § 252(d)(1)-(3).

[97] *Iowa Utilities Bd. v. FCC*, 120 F.3d 795 ("In turn, subsection 252(d) refers exclusively to the determinations by state commissions of the just and reasonable rates, and it provides statutory standards for the state commissions to follow when setting the rates").

[98] *Iowa Utilities Bd. v. FCC*, 120 F.3d 796 (emphasis added).

[99] *Iowa Utilities Bd. v. FCC*, 120 F.3d 796 (emphasis added).

[100] *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 384 (1999) (emphasis added).

state commissions have exclusive authority to set the actual rate and the Act precludes the Commission from setting a rate of zero that binds carriers and/or the state commissions.

In addition, AT&T misreads section 252(d)(2) when it suggests that a mandatory bill-and-keep regime is consistent with the Act because under such a regime "each carrier is afforded an opportunity for 'recovery' of those costs from its own end users."[101] Those "costs" that AT&T refers to include costs imposed by interexchange carriers on the LEC that seek to use the LEC's network to terminate traffic, a service for which the IXC charges its customers. The premise that bill-and-keep allows a carrier to recover costs from its own customers is incorrect.[102] The LECs' end users are not the cost causer when the LEC is required to terminate traffic; the other carrier and its customers are imposing those costs on the LEC. Unless voluntarily agreed to, bill and keep is simply an indirect subsidy that would require a LEC's end user to pay the cost of a LEC terminating other carriers' traffic.

That indirect subsidy is especially unfair to CLECs since they primarily serve business customers. Business customers typically receive more calls than they place. For PAETEC LECs' retail customers, terminating minutes are about 70% of the total volume of minutes. Thus, bill and keep would force the business end users of PAETEC to subsidize the products and services of wireless carriers and IXCs that typically service end users calling PAETEC's business customer base.

"Wholesale customers use facilities and equipment just like retail customers."[103] Positive

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101 AT&T, at 49.

102 NASUCA, at 99.

103 *Id.*

intercarrier compensation rates "reflect[] the fact that other parties that access and profit from the ubiquitous public telecom network must also pay for their fair share of that network."[104] The use of terms such as "mutual," "reciprocal," and "offsetting" in sections 251 and 252(d)(2) make clear that reading the statutory pricing standards as a whole, the Act requires the mutual and reciprocal recovery of the costs of termination from interconnected carriers, rather than end users. Thus, interconnected carriers could determine that their traffic is in balance and forego compensation. However, section 252(d)(2) does not permit the Commission to require that carriers recover these costs from end users (*i.e.*, impose an intercarrier rate of zero) as advocated by AT&T and Sprint, especially in the absence of absolutely any analysis as to whether the traffic between individual pairings of carriers is in balance.

AT&T's and Sprint's argument that "requiring carriers to recover their termination costs from end users" is a "methodology" is belied by the fact that Section 251(b)(5) and the associated section 252(d)(2) pricing standard apply to carrier to carrier obligations (and NOT to carrier to end user obligations). In fact, the Commission's rules have always made clear that the section 251(b)(5) reciprocal compensation obligation and the section 252(d)(2) pricing standard involve a compensation arrangement between two carriers, and not between a carrier and its end users. For example, Rule 51.701 provides that "a reciprocal compensation arrangement is one in which *each of the two carriers receives compensation from the other carrier* for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier."[105] These rules "apply to reciprocal compensation

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[104] CenturyLink, at 50.

[105] 47 C.F.R. § 51.701 (emphasis added).

for transport and termination of telecommunications traffic *between LECs and other telecommunications carriers*," and not end users.[106] Rule 51.703 provides "[e]ach LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic *with any requesting telecommunications carrier*."[107] These statutory provisions and rules simply do not implicate cost recovery from end users as suggested by AT&T and Sprint; rather, they are entirely focused upon intercarrier compensation pricing within a calling party pays regime involving more than one carrier.[108]

AT&T attempts to rationalize bill-and-keep by relying on a passage in the D.C. Circuit's *WorldCom* decision stating that there is a "non-trivial likelihood that the Commission has authority to elect such as system."[109] However, this passage is mere dicta of no precedential import. The Court made clear that "[h]aving found that § 251(g) does not provide a basis for the Commission's action, *we make no further determinations*."[110] Moreover, the Court stated "*nor do we decide whether the Commission may adopt bill-and-keep* for ISP-bound calls pursuant to § 251(b)(5)."[111] Thus, the passage relied upon by AT&T and Sprint is mere dicta. *WorldCom* provides no support for the proposition that the Commission may adopt bill-and-keep for all telecommunications traffic as a compensation methodology. Indeed, the Court came to regret its dicta in *WorldCom* as this proved to be an excuse for Commission inaction in justifying its

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[106] 47 C.F.R. § 51.701 (emphasis added).

[107] 47 C.F.R. § 51.703 (emphasis added).

[108] 47 C.F.R. § 51.711 ("For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic equal to those that the incumbent *LEC assesses upon the other carrier* for the same services.") (emphasis added).

[109] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

[110] *WorldCom*, 288 F.3d 434 (emphasis added).

[111] *Id.* (emphasis added).

compensation regime for ISP-bound traffic.[112]

E. The Legislative History of the Act Makes Clear that Bill-and-Keep May Only Apply If Traffic is Balanced

Sprint argues that the legislative history of the Act supports imposition of bill-and-keep.[113] Contrary to Sprint's position, the legislative history makes clear that Congress intended that bill-and-keep arrangements would only be appropriate when traffic was in balance. The Senate Report, for example, states that: "[t]he Committee intends that reciprocal compensation may include compensation arrangements, including in-kind exchange of traffic or traffic balance measures such as those included in the New York settlement agreement concerning Rochester Telephone."[114] The Rochester Telephone case referenced in the Senate Report involves the following arrangement in which *traffic is roughly balanced*:

> a local service provider would pay R-Net for traffic it delivers to R-Net for termination at a customer served by R-Net. Conversely, R-Net would pay the local service provider for traffic to be terminated at a customer served by that provider. *If the traffic is in balance, i.e., equal in both directions within a 10% tolerance band, no payments would be made by either entity for local transport. Carriers would compensate each other only for local switching.*[115]

The Rochester Telephone arrangement referenced in the Senate Report bears no resemblance to the bill-and-keep proposals of AT&T and Sprint. First, under the Rochester arrangement an in-

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112 *In re Core Communications, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) ("the FCC's delay in responding to our remand is egregious."); *id.* at 861 (noting FCC responded within one year when Court vacated earlier rule but delayed response six years when court remanded rule).

113 Sprint, at B.6.

114 *See*, S. Rep. No. 104-23, 104th Cong., 1st Sess., at 20 (1995); see also Joint Conference Report, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 118 (1996).

115 Petition of Rochester Telephone Corporation for Approval of Proposed Restructuring Plan, Opinion No. 94-25, Opinion and Order Approving Joint Stipulation and Agreement, Case No. 93-C-0103 et al. (NYPSC Nov. 10, 1994).

kind exchange is permitted for transport only, and not switching. Second, even that limited in-kind exchange for transport was deemed appropriate only if traffic was "within a 10% tolerance band."[116] In sharp contrast, AT&T and Sprint propose that bill-and-keep should apply to both transport and switching costs without any consideration of the traffic balance between the carriers. AT&T's and Sprint's proposals are inconsistent with the intent of Congress as stated in the legislative history as well as the text of the statutory pricing standards in the Act. The Commission should reject their arguments and maintain the current TELRIC standard for section 251(b)(5) compensation.

F. CLECs and Other Mid-Sized Carriers Incur Significant Costs In Transporting and Terminating Telecommunications and the Act Mandates They Be Permitted to Recover These Costs From Other Carriers

Sprint argues that "bill-and-keep is the only rational, competitively neutral, and practically feasible intercarrier compensation ('ICC') regime that can be applied to the exchange of packetized voice traffic," and further advocates establishing a bill-and-keep regime for all traffic after a transition period of three years for the three largest ILECs and CLECs.[117] Sprint is not clear as what traffic constitutes "packetized" traffic and whether this includes all IP-PSTN or PSTN-IP traffic. As others have argued, carriers cannot distinguish "packetized" traffic from other traffic such that Sprint's initial step could result in zero compensation for nearly all traffic in just three years, which is the converse of a reasonable glide path envisioned by the Commission.

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116 *Id.*

117 Sprint, at 2, 6-8, B.1.

As Facilities-based CLECs and others demonstrated in their earlier Comments, any regime that imposes a disparate rate on "packetized" traffic or interconnected VoIP traffic is unworkable because carriers cannot distinguish "packetized" traffic from other forms of traffic.[118] Further, as discussed above, imposing the bill-and-keep methodology on all carriers irrespective of their costs of transporting and terminating telecommunications traffic, and without regard to whether traffic is in balance, violates the section 252(d)(2) pricing standard.

Most importantly, Sprint bases its bill-and-keep proposals on the flawed argument that "[i]t is highly unlikely that any IP network operator incurs any 'additional costs' in terminating packetized voice traffic originating on other IP networks."[119] Sprint asserts that "the costs of terminating VoIP traffic, if not zero, is miniscule."[120] Sprint argues that bill-and-keep can be imposed and "[t]raffic balance is no longer relevant" because "it is doubtful any network operator incurs any traffic sensitive costs in call termination."[121] Sprint's arguments are undermined by the fact that most carriers (perhaps with the exception of the three remaining RBOCs who have enormous and unmatched economies of scale) incur significant costs in transporting and terminating telecommunications traffic. PAETEC for one has demonstrated that its costs of termination are well above the uniform rate of $0.0007 per minute of use ("MOU") proposed by Verizon,[122] let alone the rate of zero proposed by AT&T and Sprint. The PAETEC cost study did include the costs of terminating packetized traffic. In addition, the RBOCs have

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118 *See, e.g.*, Facilities-based CLECs, at 14-16.

119 Sprint, at 2, 6-8, 21 B.2 ("It is doubtful that IP network operators incur any additional costs in transporting and terminating packetized voice traffic") (emphasis added).

120 Sprint, at B.2.

121 *Id,* at B.8.

122 *See, e.g.*, Verizon, at 3, 5; Verizon Ex Parte Letter, CC Docket No. 01-92, at 4 (Sept. 12, 2008); Verizon Comments, NPB Public Notice No. 19, GN Docket No. 09-51, at 19 (Dec. 7, 2009).

argued for years in various TELRIC dockets and other state proceedings that they incur significant costs in the transport and termination of telecommunications traffic.[123]

PAETEC demonstrated through a study conducted by QSI that its costs of terminating telecommunications traffic (regardless of whether it is local, intrastate long distance, interstate long distance, ISP-bound, IP-PSTN, or PSTN-IP) are many times higher than $0.0007 even using a network that incorporates soft switches and IP-based technology.[124] Further, according to QSI's analysis, even if all shared, common and other costs are removed (costs that are legitimately recoverable under the Commission's TSLRIC and/or TELRIC methodologies) and consider only the absolute minimum incremental cost relevant to a minute of use, PAETEC's costs currently exceed $0.0007 per MOU.[125] Thus, notwithstanding the fact that PAETEC operates one of the most efficient networks ever studied by QSI,[126] even PAETEC cannot currently recover its costs of termination with a $0.0007 rate.

G. RBOC Comments Confirm That Carriers Incur Significant Costs in Terminating Telecommunications

AT&T's and Sprint's bill-and-keep positions are also undermined by the fact that RBOCs have long argued in UNE cost and similar proceedings that the costs of transporting and terminating telecommunications are significant and include traffic sensitive costs. For example,

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[123] *See, e.g,* DPUC Investigation Into the Southern New England Telephone Company's Cost of Service Re: Reciprocal Compensation, Docket No. 09-04-21, Reply Brief of SNET, at 4-5, 36 (Dec. 4, 2009).

[124] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Ex Parte Letter of PAETEC, Attached Declaration of Michael Starkey of QSI, at ¶¶ 2-3, 7 (Oct. 17, 2008) ("Starkey Declaration"). Nuvox has provided similar evidence of the incurrence of traffic sensitive costs. Ex Parte Letter of Nuvox, CC Docket No. 01-92 (filed Dec. 31, 2008).

[125] Starkey Declaration, at ¶ 2.

[126] Starkey Declaration, at ¶ 9 ("PAETEC employs some of the most utilized switches ever studied (both circuit-switched and IP-enabled platforms) by QSI.").

in 2009, AT&T argued for reciprocal compensation rates of $0.002933 per MOU (tandem), and $0.001861 (end office) in Connecticut.[127] AT&T's proposed rates were based upon AT&T's cost models and costs studies which were found acceptable by the state commission.[128] AT&T rejected a CLEC's arguments that AT&T "should provide tandem and end office switching for free, with no cost recovery whatsoever, because AT&T Connecticut already has enough switching capacity."[129] In fact, AT&T warned the state commission that imposition of a rate of zero for these termination functions is prohibited by the U.S. Constitution which "forbids confiscatory rates."[130] In the past, Bell South also argued that mandating bill-and-keep violates the takings clause of the Fifth Amendment of the U.S. Constitution.[131] In establishing reciprocal compensation rates, AT&T argued that "simply adopting a default rate instead of analyzing state-specific evidence" is unlawful as "merely adopting that rate based on an inference, which has no record support" would be arbitrary and capricious.[132] Yet, that is effectively what AT&T advocates in the present docket by arguing for a bill-and-keep regime in the absence of any evidence that traffic for specific carriers is in balance. As AT&T pointed out in the Connecticut docket, the "$0.0007 is a rate that the FCC said ILECs have the *option to adopt voluntarily*, but,

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127 *DPUC Investigation Into the Southern New England Telephone Company's Cost of Service Re: Reciprocal Compensation*, Docket No. 09-04-21, Reply Brief of SNET, at 4-5, 36 (Dec. 4, 2009) ("CT AT&T Reply Brief"); Docket No. 09-04-21, Initial Brief of SNET, at 4 (Nov. 18, 2009) ("CT AT&T Initial Brief").

128 CT AT&T Reply Brief, at 36.

129 CT AT&T Reply Brief, at ¶¶ 2, 25.

130 CT AT&T Reply Brief, at ¶¶ 2, 25 ("Denial of all cost recovery . . . would be confiscatory.").

131 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd. 15,499, 16057, at ¶ 1116 (Aug. 8, 1996) ("First Local Competition Order"); *See, infra*, at 22-23.

132 CT AT&T Reply Brief, at 41.

as the FCC also said, it does not purport to reflect the costs of reciprocal compensation or of any particular carrier."[133]

AT&T argued before the state commission that end office switching costs are "usage-sensitive" (*i.e.*, traffic sensitive). AT&T noted that "Cable CLECs are arguing that end office switching costs are not usage-sensitive at all," which AT&T concluded is "demonstrably false."[134] Rather, AT&T maintained that "[i]n computing switching costs, AT&T Connecticut's cost studies needed to consider the usage-sensitivity of end office switches."[135] Further, AT&T noted that the "FCC and state commissions have consistently approved of TELRIC cost studies that treated end offices as approximately 70% usage-sensitive."[136]

AT&T's prior comments in this docket also confirm that carriers incur traffic sensitive costs in terminating telecommunications. AT&T's prior comments indicated that soft switch expansions are driven by trunk port expansions, which in turn are driven by traffic volumes.[137] Further, because soft switches are sized to accommodate traffic, a massive increase in the total volume of traffic – associated with call terminations – requires a massive expansion of soft switch facilities. Similarly, Embarq notes that "a soft switch is more sensitive to traffic volumes

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[133] *Id.*

[134] CT AT&T Initial Brief, at 24.

[135] *Id.*

[136] *Id.* In support of this assertion AT&T cited the following: BellSouth 5-State 271 Order, 17 FCC Rcd. 17595, ¶ 93 (2002) ("a state commission's allocation of 30 percent fixed to 70 percent minutes-of-use does not fall outside a reasonable range"; approving of five different state commission orders that used usage-sensitive percentages for end office switching of from 68% to 72%); *see also*, Maine 271 Order, 17 FCC Rcd. 11659, ¶ 29 (2002) (approving of state commission adopting rates based on end office switches being 70% usage-sensitive).

[137] Reply Declaration of August Ankum, Ph.D, and Olesya Denney, Ph.D. on behalf of PAETEC, WC Dockets Nos. 03-109, 04-36, 05-337, 06-122, and 07-135; CC Docket Nos. 96-45, 96-98, 99-68, 99-200, and 01-92, at ¶¶ 47-56 (Dec. 22, 2008) (analyzing AT&T Comments, at 13) ("Ankum Declaration").

as it continuously sends voice packets throughout the duration of the call."[138] Thus, even highly efficient CLECs that utilize only soft switches incur traffic sensitive costs in terminating telecommunications.

H. The Commission Cannot and Should not Set a Specific Rate (or Faster Transition) for any Single Sub-category of Traffic, whether "Packetized" Traffic, VoIP Traffic, or CMRS Access Traffic

Rather than reform intercarrier compensation holistically, a number of parties argue that the Commission should single out specific sub-categories of "telecommunications" for a special rate or faster transition period. For example, Sprint argues that "the Commission should rule that packetized voice traffic is to be exchanged on a bill-and-keep basis" immediately while other traffic would transition to bill-and-keep over a minimum of three years for the "three largest [ILECs] and their competitors."[139] As in their comments on Section XV issues, many parties advocated a special rate (typically $0.0007 or bill-and-keep) or faster transition for VoIP traffic.[140] Sprint also advocated bill-and-keep for all access traffic exchanged with CMRS carriers.[141]

The Commission could not justify a methodology that interprets sections 251(b)(5) and 252(d)(2) in one manner as to VoIP or "packetized" traffic and in an entirely different manner with respect to other "telecommunications." Sprint acknowledges that "packetized voice traffic has a telecommunications component and § 251(b)(5) applies to the exchange of

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[138] Ankum Declaration, at ¶ 58; Embarq Comments, at 50 (Nov. 26, 2008).

[139] Sprint, at 2, 6-8.

[140] *See, e.g.*, Google, at 9 (default rate for exchange of IP traffic should be bill and keep); Sprint, at 2 (same); Verizon, at 3 (VoIP should be subject to $0.0007 rate immediately).

[141] Sprint, at 13-15.

'telecommunications'"[142] and argues that "as a matter of law, all 'single rate' traffic [including mobile traffic] should be subject to reciprocal compensation rather than access charges."[143] Carriers incur roughly the same costs in terminating "packetized" and TDM traffic, whether or not the originating carrier offers all-distance calling plans for a single rate, especially where IP-IP interconnection is not prevalent due to ILEC resistance. In the *ISP Remand Order*, the Commission acknowledged that the record "fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP" (a form of ESP).[144] The Commission also observed: "Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5)."[145] Accordingly, the Commission saw "no reason to impose different rates for ISP-bound [a form of ESP traffic] and voice traffic."[146] Based upon these findings, the Commission promulgated the "mirroring rule" which provides that:

> Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to "pick and choose" intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, only if an incumbent LEC offers to exchange *all traffic subject to section 251(b)(5) at*

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[142] Sprint, at B.1.

[143] Sprint, at 14.

[144] *ISP Remand Order*, at ¶ 90, n. 180.

[145] *ISP Remand Order*, at ¶ 92-93 ("The overall record in this proceeding does not lead us to conclude that any system architectures or technologies widely used by LECs result in material differences between the cost of delivering ISP-bound traffic and the cost of delivering local voice traffic, and we see no reason, therefore, to distinguish between voice and ISP traffic with respect to intercarrier compensation.").

[146] *ISP Remand Order*, at ¶ 91 ("We are not persuaded by commenter's claims that the rates for delivery of ISP-bound traffic and local voice traffic should differ because delivering a call to an ISP is inherently less costly than delivering a voice call to a local end-user.").

> *the same rate* . . . This "mirroring" rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.[147]

Under this rule, ILECs that adopted the regime offered to exchange all traffic at the rate of $0.0007, and CLECs decided whether to accept the offer or maintain different rates for voice and ISP-bound traffic. Just as with ISP-bound traffic, "packetized" traffic does not impose different costs on the LEC that serves the ESP customer. Where two carriers are interconnected in TDM, the cost of terminating a call to an ESP or TDM customer should not vary.[148]

Because the section 252(d)(2) pricing provision expressly requires the consideration of "costs" in adopting any alternative arrangement -- and because only state commissions are authorized pursuant to section 252(d) to consider such costs and determine the appropriate rates and mechanism for reciprocal compensation -- the Commission could not grant the "bill-and-keep" relief that some have sought for specific sub-categories of telecommunications, such as VoIP compensation.

Finally, expanding the subcategories of telecommunications that are subject to a special rate (or transition period) would perpetuate, if not increase, arbitrage. ITAA argued that "the proposal to establish a special rate for one type of voice calling is nothing more than a request for a government sanctioned competitive advantage."[149] Moreover, as Facilities-based CLECs and others argued in Section XV comments, there is no practical way to segregate VoIP traffic from

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[147] *ISP Remand Order*, at ¶ 89.

[148] To the contrary, because the LEC serving the ESP is forced to interconnect in TDM, it actually may incur *additional costs* to convert the TDM traffic to IP. Of course, carriers could voluntarily agree to different rates, but the Commission could not impose different rates without finding a cost basis to do so.

[149] ITAA Section XV Reply Comments, at 3-4.

all other traffic to impose a special rate.[150] Similarly, there is no practical way to segregate "single rate" traffic from local/toll rate traffic. The Commission should decline invitations to further complicate the task of parsing telecommunications into arbitrary buckets for the purpose of applying special rates with no basis in cost.

I. A Low Uniform Rate of $0.0007 Has no Basis in Cost and Would Cause End Users to Subsidize Wholesale Customers, Place too Great a Burden on Proposed Recovery Mechanism and Jeopardize Continued Private Investment

In their Section XV comments, Facilities-Based CLECs presented substantial record evidence that a rate of $0.0007 has no basis in cost and may not permit carriers to recover the cost of billing intercarrier compensation, let alone the cost of terminating calls.[151] Numerous parties agreed that Commission should not adopt such a low rate.[152] Those parties that ignore the statute and continue to advocate $0.0007 as a uniform rate argue that the Commission has discretion to adopt it, in part because it is widely used by carriers today.[153] To the extent their claims are true—Verizon, for example, provides no statistics to back up its claim that a substantial amount of traffic is billed at $0.0007 today—it is the result of the *ISP Remand Order* and mirroring rule, not commercial negotiations. Even assuming, *arguendo*, that the Commission had the authority to set a unified rate, it should not and cannot rely on the rate it created by regulatory fiat as a "market-based" rate it has discretion to apply to all telecommunications. Indeed, when Sprint proposed a rate of $0.0007 for section 251(b)(5)

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150 Facilities-based CLECs Section XV Reply Comments, at 15.

151 Facilities-based CLECs April 1 Comments, at 38-42.

152 *See, e.g.*, Cbeyond et al, at 13; CenturyLink, at 57-62; Comcast April 18 Reply Comments, at 7, 11-12.

153 *See, e.g.*, Verizon, at 12; CTIA, at 38.

compensation in Connecticut, AT&T argued that "merely adopting that [$0.0007] rate based on an inference, which has no record support, that it is somehow above AT&T Connecticut's costs would be arbitrary and capricious."[154]

Although Facilities-based CLECs disagree with Verizon's proposed rate of $0.0007, we agree that the rate must be positive to avoid creating future arbitrage opportunities. As Verizon argued, mandating that termination, a service with a cost, "be provided for free would invite carriers to figure out how to abuse the system in creative ways. Indeed, a bill-and-keep system would make it free for other carriers to use networks, thereby removing incentives for other carriers to manage the flow of traffic efficiently and inviting potential abuse."[155] As NASUCA argued, the same arbitrage opportunities will result from setting the cost of termination at near-zero, such as $0.0007. Namely, "if the cost of access is reduced to zero, or near-zero; carriers will have every incentive to dump traffic on to other carriers' networks."[156]

The State Members of the Joint Board cited NECA studies of the impact of various intercarrier compensation rate changes on small LECs. Although NECA did not estimate the impact on small LECs of unifying all intercarrier compensation rates at $0.0007, it did estimate the impact of moving to bill and keep: "NECA reported that if all intercarrier compensation were eliminated under a bill and keep regime, the national weighted mean effect on local rates would be a rate increase of $16.47."[157] CenturyLink agreed that bill and keep or a very low rate such as $0.0007 "would substantially reduce CenturyLink's funding available for CAPEX, lead to

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[154] CT AT&T Reply Brief at 40-41.

[155] Verizon, at 14.

[156] NASUCA, at 101.

[157] State Members, at 104; NECA et al, at App B, Table 8.

adverse reactions by stock and bondholders, and ultimately lead to job reductions not job creation."[158] The Commission should not adopt a final, unified rate at this stage of the proceeding. Instead, it should adopt a national policy goal of eventually unifying a carrier's rate for termination of all telecommunications and provide states incentives to equalize intrastate with interstate access rates as the first step towards achieving that national policy.

J. A Unitary Rate that is Based on Costs but Varies by Class of Carrier is the Best Means to Reduce Arbitrage

Although a below-cost unitary rate is bad for the industry, consumers, and the universal service fund, Facilities-based CLECs agree that the right unitary rate is a worthy goal for long-term intercarrier compensation reform. Specifically, we agree with the State Members of the Joint Board that "[e]ach seller [should] offer[] a uniform rate to all buyers of termination service. But not all sellers [should] offer the same rate. Under the plan, many rates decline, but some increase."[159] As explained herein, this does not require that state commission review cost studies for each LEC operating in their state. Rather, each state commission could adopt benchmarks for different classes of carriers based on the TELRIC cost studies it has reviewed to date, or new studies it could require as part of a cost proceeding to update such rates.

Facilities-based CLECs agree with the Kansas Corporation Commission, NASUCA, NECA, CenturyLink and others that urge the Commission to unify each carrier's rate, rather than establish a national, unified rate. As NECA argues, a "uniform rate across all carriers would fail to account for the differences in costs incurred by carriers or the unique circumstances associated

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[158] CenturyLink, at 53.

[159] State Members, at viii.

with providing service in high-cost rural areas of the nation."[160] The Commission has recognized differences among carrier classes and even within carrier classes, such as the different target CALLs rates and the varied rates established under the MAG plan. Under the CALLS plan, for example, the BOCs and GTE were required to reduce their switched access charges to an average of $0.0055 per minute by 2004; very low density price cap ILECs to an average of $0.0095 per minute; and other price cap ILECs to an average of $0.0065 per minute.[161] Similarly, in reducing rate-of-return carriers' interstate access rates, the Commission gave such carriers the "flexibility to establish rates based on their own costs in the areas they serve, rather than being forced to conform to a prescribed target rate."[162]

Without any explanation or support, Verizon argues that the default rate of $0.0007 should apply regardless of carrier or distance because "such a low, uniform rate will ensure competitive and technological neutrality and help eliminate the fraud, arbitrage and economic distortions caused by today's disparate intercarrier compensation rates."[163] Verizon does not provide a single example to support its claim that a national, uniform rate is necessary to reform today's intercarrier compensation system. Indeed, the premise of the NPRM is that a terminating

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[160] NECA *et al*, at 20. *See also* CenturyLink, at iv, 57 (FCC should move intrastate to interstate access rates "on a per-carrier basis"); Kansas Corporation Commission, at 12 ("rates may vary by carrier since costs vary by carrier").

[161] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, Low-Volume Long-Distance Users, CC Docket No. 99-249, Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, ¶ 162 (2000) ("CALLS Order").

[162] *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket Nos. 96-45, 98-77, 98-166, 00-256, Second Report and Order and Further Notice of Proposed Rulemaking Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, ¶ 12 (2001) ("MAG Order").

[163] Verizon, at 11.

rate that varies based on jurisdiction (intrastate or interstate) and type of traffic (wireline, wireless) is what causes arbitrage.[164] The NPRM does not even posit an example of how terminating rates that differ *by carrier* cause arbitrage. To the contrary, the NPRM assumes that each terminating carrier enjoys somewhat of a monopoly with respect to third parties attempting to call the terminating carrier's customer.[165]

In order to be administratively feasible, the Commission could require states to establish benchmark rates by class of carrier, but retain the option for individual carriers to submit cost studies to support a different rate. The Commission should not, however, automatically assign CLECs to the same class as the three largest RBOCs. Most efficient CLECs trail substantially behind AT&T and Verizon with respect to economies of scale required to produce per-minute-of-use costs anywhere near the $0.0007 rate proposed by Verizon in this proceeding. Indeed, it is important to highlight the fact that AT&T's and Verizon's per-unit costs of production for traffic termination services stand as outliers to other carriers in the industry.[166] As the Commission found in the CALLS Order, the lowest target rate was appropriate for the BOCs and GTE "due to their economies of scale and broad subscriber bases" while a "slightly higher target rate" was reasonable for "other LECs that by definition do not have the subscriber bases and resources of the larger BOCs."[167] Moreover, the Commission found it appropriate to adopt an even higher target rate for low-density LECs because "the nature of their service areas" causes them to "experience costs that are significantly higher than other price cap LECs of their size"

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164 NPRM, at ¶ 494.

165 NPRM, at ¶ 24.

166 Starkey Declaration, at ¶ 3.

167 CALLS Order, at ¶ 177.

that they are "unable to spread [] over a large subscriber base."[168] CLECs have far more in common with mid-sized LECs regarding their costs and market position than RBOCs as they have lower customer densities, lower switch utilization, fewer switches and more transport, and higher per-unit network costs than RBOCs.[169] Thus, if the Commission establishes a different rate or glide path depending on the type of carrier, CLECs should not be paired with the three largest RBOCs. Rather, they should be considered similar to mid-sized LECs for the purposes of any unified rate or transition plan.[170] Indeed, the assumption that a CLEC would mirror the RBOC merely because a CLEC offers service in the RBOC's legacy exchange thoroughly ignores cost causation principles.

To implement benchmarking similar to the CALLS Plan, the Commission should amend its reciprocal compensation rules to recognize the cost differences among classes of carriers. Section 252(d)(2)(A) specifies that a carrier is entitled to a reciprocal compensation rate that provides for the recovery of "a reasonable approximation of the additional costs [to the carrier] of terminating" calls from the other carrier.[171] Under this provision, Commission rule 51.711[172]

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168 *Id.*

169 Starkey Declaration, at ¶ 3.

170 *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Ex Parte Letter of PAETEC, at 3-5 (Oct. 17, 2008)

171 Section 252(d)(2)(A) of the Act states that "for purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions of reciprocal compensation to be just and reasonable unless":

> such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and [] such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. § 252(d)(2)(A).

172 47 C.F.R. § 51.711.

currently establishes a presumption that the reciprocal compensation rates that two carriers may charge each other are symmetric, with the symmetric rate generally set to cover the forward-looking costs of the larger carrier or the incumbent where one is involved in the call.[173] The rule also provides, however, that a CLEC may charge a rate higher than the symmetric rate after verifying to a state commission that its transport or termination costs justify the higher rate.[174] In short, while the rules recognize and account for the fact that cost-based rates may vary by carrier, they both penalize and reward CLECs by requiring them to match the rate of the incumbent (RBOC or rural) with whom they exchange traffic. Creating benchmark rates by class of carrier would recognize cost variations inherent in each class and help reduce the instance of both below-cost and above-cost rates that permit arbitrage.

III. GLIDE PATH

A. Because Aggregate Data Shows Equalizing Access at Interstate Rates Could Have Significant Negative Financial Impact on Carriers, Proposals to Equalize All Such Rates on January 1, 2012 Would Have a Destabilizing Impact on the Industry as a Whole

AT&T's and Sprint's proposal to unify all intrastate and interstate access rates on January 1, 2012 is precisely the type of flash-cut that could lead to disastrous consequences, and, therefore, must be avoided.[175] As explained in Section III.C, for carriers, such as AT&T and Sprint, and states that wish to equalize rates on a faster timetable, Facilities-based CLECs and the State Members of the Joint Board proposed self-election mechanisms that would permit each carrier/state to make that choice based on its individual circumstances. Indeed, the self-election

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[173] 47 C.F.R. § 51.711(a).

[174] 47 C.F.R. § 51.711(b).

[175] AT&T, at 30-31; Sprint, at 8-9.

proposals would get to the ultimate goal of a single rate for all traffic, thus eliminating incentives for providers to disguise traffic as local in order to take advantage of lower termination rates. Together, a default measured glide path and these self-election mechanisms would achieve the Commission's goals of harmonizing rates, minimizing disruption to service providers, and minimizing the impact on the size of the universal service fund.[176]

Record evidence submitted by numerous parties shows that unifying intrastate and interstate access rates could cause a precipitous drop in revenue. For example, the State Members of the Joint Board cited NECA studies of the impact on small rate-of-return LECs, which found that "if [intrastate] access rates were reduced to interstate access rates, the national weighted mean effect on local rates would be a rate increase of $5.98."[177] The adverse financial impact is not limited to small incumbent carriers. PAETEC, for example, has submitted intercarrier compensation revenue, expense, and MOU data that includes an estimate of the impact, by state, of the potential revenue loss that would result from equalizing its access rates. For the State of New York, PAETEC translated the potential revenue loss into the number of employees that are supported by the potential revenue loss. Like the NECA rates Facilities-based CLECs analyzed in their initial comments,[178] three of the four CLECs currently have intrastate access rates (or revenue per minute of use) in multiple states that exceed their interstate rates (or revenue per minute of use) by more than 300%. In contrast, AT&T had only one state

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[176] NPRM, at ¶ 535.

[177] State Members, at 102, NECA et al, at App B, Table 8.

[178] Facilities-based CLECs, at 20-21.

in which its rates exceeded that threshold, and by only one percent[179] and the fourth CLEC similarly has a smaller delta between its intrastate and interstate access rates.

The fact that the Commission has been considering equalizing access rates for years does not mean that all carriers, investors, state commissions, and end users, have built such rate cuts into their planning and forecasts. There are numerous examples of the Commission requiring transition periods to decrease rates in order to provide certainty and avoid rate shock. For example, the CALLS plan stepped down price cap rates over a period of five years,[180] the *CLEC Access Reform Order* stepped down CLEC access rates over a period of three years,[181] and the *ISP Remand Order* stepped down the rate for ISP-bound traffic over a period of three years.[182] In each case, the Commission adopted transition periods notwithstanding the fact that the rate reductions had been contemplated for some time.

As CenturyLink argued, reducing intrastate to interstate access rates over a measured transition period would "moderate the impact on consumers and allow higher broadband adoption" while at the same time minimizing "the risk that reform will have a negative impact on private investment."[183] Based on the substantial record evidence that a flash-cut from intrastate to interstate access rates could have an adverse impact on end user rates, the universal service

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179 Facilities-based CLECs, at 22.

180 CALLS Order, at ¶ 37 (during the CALLS plan five-year term, "[a]ll parties will have a much clearer blueprint for developing their business plans and attracting capital than they would in the absence of CALLS.").

181 *Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd 9923, ¶ 52 (2001) (adopting a three-year transition period based on a concern about "the effects of a flash-cut" and "to allow sufficient time for CLECs to adjust their business models").

182 *ISP Remand Order*, at ¶ 78.

183 CenturyLink, at 60.

fund, individual carrier's financial position, and private investment in the telecom sector, the Commission should adopt a measured transition period.

B. States Support a Measured Transition to Equalize Access Rates

Just as carriers need time to adjust business plans to incorporate lower revenues from intrastate access, states need time to adopt and implement lower intercarrier compensation rates and other reforms that will be necessitated by the loss in revenue. Michigan requested that the Commission give states four years to begin, not complete, the necessary reforms.[184] Mississippi and Missouri requested a minimum of five years for access rates to reach parity, Massachusetts requested three to five years for states to complete reforms, and Washington agreed four years is a reasonable transition period to equalize access rates, but recognized that some states may need more time.[185] The Wisconsin legislature recently passed a law that requires large CLECs (those with more than 10,000 access lines in Wisconsin) to bring access rates into parity within six years, although the reductions need not begin until four years after the Act becomes law.[186] The Commission should heed these state requests and continue its cooperative partnership with states in pursuing universal service and intercarrier compensation reforms.

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184 Michigan PSC, at 16.

185 Mississippi PSC, at 14-15; Missouri PSC, at 24; Massachusetts DTC, at 22; Washington UTC, at n.28.

186 JR1SB-13, Section 77, amending 196.212(2)(b).

C. The Commission Should Adopt Proposals that Would Permit Election of Unified Rate by Carrier/State

1. Self-electing Proposals Address Calls for Quicker Transition[187]

Facilities-based CLECs proposed that the Commission permit each carrier to elect a uniform rate for termination of all traffic. The State Members of the Joint Board made a similar proposal:

> Each telecommunications carrier in that State would establish a maximum intercarrier per-minute termination rate that is not higher than the lower of its own current per-minute interstate termination rate and its average intercarrier compensation terminating rate.[188]

The State Members' would define the average intercarrier compensation terminating rate "as the sum of current terminating revenue divided by the sum of terminating minutes."[189] They further propose that this maximum rate would be calculated for each carrier one time, in 2012, and would apply at least through 2017.[190]

Although the State Members' plan would streamline determination of the unitary rate, it has the disadvantage of relying on current access rates, many of which have no relation to cost, which means the proposed rates would also violate section 252(d)(2). Facilities-based CLECs believe that setting the unified rate based on the TELRIC standard established by the Commission would be consistent with the Act and also more likely to end arbitrage opportunities that arise from above- (or below-) cost rates. The Commission may wish to consider some combination of the two methodologies, however, to gain the advantages of both. For instance, a

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187 RCN Telecom Services, LLC does not join in this section of the Reply Comments.

188 State Members, at 154.

189 State Members, at n.245.

190 State Members, at 154.

state/carrier electing the unified rate could start charging the capped rate proposed by the State Members immediately upon election, but be required to submit a cost study for the state's review to set the final unified rate.

The State Members' proposal also does not address the many federal rules that would need to be amended to accommodate such state action. As Facilities-based CLECs explained in their initial comments, the Commission would need to waive or modify the following rules to accommodate such unitary rates: symmetrical reciprocal compensation; *ISP Remand Order* rate cap, mirroring rule, and rebuttable presumption; CLEC benchmark rules; and the prohibition on tariffing terminating compensation for non-access CMRS traffic.[191]

2. The Fact that Other Carriers/States Do Not Elect to Unify Rates Should Have no Adverse Impact on a Carrier's/State's Election

Facilities-based CLECs anticipate that some may object to the self-election unitary rate proposal by arguing that all carriers' rates must decline simultaneously.[192] Any such objection would be unfounded. Parties noted that intercarrier compensation expense savings "will be competed away quickly."[193] AT&T, for example, argued that the Commission should not count on expense savings from access expense reductions to offset lost revenue from access revenue reductions, again based on the premise that expense savings will be passed through to retail and wholesale customers.[194] If intercarrier compensation savings are unrelated to intercarrier compensation revenue reductions for purposes of the access recovery mechanism, they cannot be related for purposes of the amount and speed of revenue reductions either.

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[191] Facilities-based CLECs, at 25.

[192] *See, e.g.*, Verizon, at 19 (asserting, without explanation, that "it is important that the stepping down be simultaneous for all providers").

[193] CenturyLink, at 66.

[194] AT&T, at 35-37

IV. COMMISSION/STATE AUTHORITY

A. Rates for non-ILECs Should Be Subject to the Same Cost Standard/Set by Same Regulator

Verizon argues that "although section 251(b)(5) applies to all LECs, Congress only established a pricing standard for ILECs," such that, in Verizon's view, there is a significant amount of traffic that "is covered by section 251(b)(5) but not section 252(d)(2)."[195] Verizon concludes that section 252(d)(2) does not govern "rates charged by non-ILECs even if an ILEC is involved."[196] Verizon misconstrues the scope of section 252(d)(2). As demonstrated in Section II.D above, the statutory pricing standards at section 252(d)(2) govern whether the compensation rates for exchange of traffic between two carriers are just and reasonable. Thus, section 252(d)(2) at a minimum provides the pricing standard for all section 252(b)(5) traffic exchanged between an ILEC and any other interconnecting carrier. While we do not have precise figures, this would likely encompass well over 90% of all telecommunications in light of the ILEC's overwhelming combined market share. It would make no sense for the Commission to use a different pricing standard for that small amount of telecommunications that would not be, under Verizon's theory, be covered by Section 252(d)(2). Accordingly, the section 252(d)(2) pricing standards should be applied to all telecommunications to ensure consist results and avoid the inadvertent creation of arbitrage opportunities.

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195 Verizon, at 43.

196 *Id.*

B. Intrastate Exchange Access is an Intrastate "Service" Subject to State Jurisdiction Unless and Until the Commission Supersedes Such Jurisdiction under Section 251(g)

AT&T argues that Section 2(b) of the Act, which preserves state authority over intrastate services does not "have any application today" as the industry moves toward IP-enabled services.[197] AT&T urges the Commission to "conclude that section 2(b) applies wholly to intrastate *services*, and not to individual *calls* that happen to originate and terminate within the same state."[198] AT&T misconstrues section 2(b). Section 2(b) provides in relevant part that: "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) *charges*, classifications, practices, *services*, facilities, or regulations for or in connection with *intrastate communication service by wire* or radio of any carrier."[199] AT&T argues that because section 2(b) refers to "intrastate services" and not "traffic," it does not limit the Commission's jurisdiction to regulate intrastate calls. AT&T's theory is novel but wrong. Intrastate exchange access is an intrastate "service" subject to state jurisdiction, which is preserved by Section 2(b), unless and until the Commission supersedes state access regulations under section 251(g). Of course, this intrastate service involves traffic, however, AT&T's purported distinction between a "service" and its associated "calls" is untenable. Under section 2(b), state commissions retain jurisdiction over the *service* offered by LECs that other carriers use to terminate *calls*.

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[197] AT&T, at 43.

[198] *Id*, at 44.

[199] 47 U.S.C. § 152(b) (emphasis added).

C. The Commission Should not Preempt State Authority Based on the Argument that it is Economically and Operationally Infeasible to Separate Intra from Interstate Traffic

Courts apply a presumption against preemption.[200] To the extent that intrastate and interstate traffic is inseverable, the Act dictates the path to arrive at a unitary rate to achieve a national policy of preventing arbitrage. That path does not include federal preemption. Rather, the Act requires the Commission and state commissions to share jurisdiction over the intrastate and interstate aspects of interconnection, with the Commission setting the methodology for the transport and termination of telecommunications, and the states setting the rate.

Both AT&T and Verizon argue that the Commission should preempt state jurisdiction over intrastate access charges because it is economically and operationally infeasible to separate intrastate from interstate traffic.[201] According to their logic, all traffic must be rated the same to prevent arbitrage, it is uneconomic and operationally difficult for carriers to segregate traffic into intrastate and interstate jurisdictions, and therefore the Commission can declare all traffic inseverable and preempt state jurisdiction on the basis that a higher state rate would conflict with federal policy. While appealing on its surface, this argument reverses the policy choice made by Congress. As the U.S. Court of Appeals for the Third Circuit stated:

> the Act provides that various responsibilities are to be divided between the state and federal governments, making it "an exercise in what has been termed cooperative federalism." That is, "Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due regard to the local conditions and the particular historical circumstances of local regulation under the prior regime." The "intended effect" of such a regime

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200 *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003).

201 AT&T, at 45-48; Verizon, at 33-34.

was to "leav[e] state commissions free, where warranted, to reflect the policy choices made by their states."[202]

The Act's cooperative federalism works both ways. State commissions play a prominent role in implementing and enforcing section 251, the Commission's regulations under section 251, and other local competition provisions of the Act. The Act "expands the applicability of both national rules to historically intrastate issues, and state rules to historically *interstate* issues," in enforcing and implementing local competition.[203] The Commission has found that sections 251 and 252 "can only logically be read to address both interstate and intrastate aspects of interconnection…."[204] The Commission reiterated in 2008 that the Commission "and the states 'are to address the same matters through their parallel jurisdiction over both *interstate* and intrastate matters under sections 251 and 252.'"[205] In short, with respect to interconnection and the transport and termination of telecommunications, AT&T and Verizon ignore the Congressionally defined roles of the Commission and state commissions. To the extent the transport and termination of telecommunications is inseverable, and the national policy requires a uniform rate, Congress granted state commissions the jurisdiction to set that rate and limited the Commission's role to establishing the methodology for calculating such rate.[206]

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[202] *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 335 (3rd Cir. 2007) (citations omitted).

[203] First Local Competition Order, at ¶¶83-84 (emphasis added).

[204] *Id.* ¶ 92.

[205] *Id.* at ¶ 18 (emphasis added) (citing ¶ 85 of its First Local Competition Order).

[206] Where a state refuses to take action to begin the process of unifying rates, or is prohibited by state law from doing so, conflict preemption based on inseverability may be appropriate. *See, e.g.*, Michigan PSC, at 15.

V. CONCLUSION

The Facilities-based CLECs urge the Commission to implement the changes to its rules recommended herein to move the industry toward a non-zero unified terminating rate through a phased plan that begins with reductions of intrastate rates to interstate rates over a measured transition period that varies by carrier and by state. The CLECs look forward to working cooperatively with the Commission and industry participants to overhaul current intercarrier compensation policies.

Respectfully submitted,

/s/

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Dated: May 23, 2011

EXHIBIT A

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FILED/ACCEPTED

MAR - 4 2011

Federal Communications Commission
Office of the Secretary

March 4, 2011

By Messenger

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Submission of Contract Pursuant to 47 U.S.C. § 211 and 47 C.F.R. § 43.51

Dear Ms. Dortch:

Pursuant to § 211 (a) of the Communications Act of 1934, as amended, and § 43.51 of the Commission's rules, AT&T hereby files the agreement between AT&T-22State and U.S. Metrotel, LLC to provide Transit Traffic service in the state of Michigan. If you have any questions, please do not hesitate to contact me at (202) 457-2040.

Sincerely,

/s/ William Roughton
General Attorney
AT&T Services, Inc.

TRANSIT TRAFFIC SERVICE PRICING - MICHIGAN

Michigan

1.0 Transit rates will be determined on a monthly basis depending on the monthly volume of Transit Traffic originated by CARRIER utilizing AT&T MICHIGAN's Transit Traffic Service. Monthly volumes will be determined on a statewide minute of use basis.

1.1 When CARRIER's Transit Traffic is 20,000,000 minutes of use or less in a single month, the rate for all Transit Traffic originated by CARRIER for that month will be:

Tandem Switching -	$.004985 per minute of use
Tandem Termination -	$.000156 per minute of use
Tandem Facility - per mile	$.000036 per minute of use

1.2 When CARRIER's Transit Traffic is greater than 20,000,000 minutes of use in a single month, the rate for all Transit Traffic originated by CARRIER for that month will be:

Tandem Switching -	$.006481 per minute of use
Tandem Termination -	$.000203 per minute of use
Tandem Facility - per mile	$.000047 per minute of use

2.0 In the event that AT&T MICHIGAN cannot mechanically bill on a monthly basis the appropriate rate based on the Transit Traffic volumes originated by CARRIER in Sections 1.1 through 1.2 above, AT&T MICHIGAN will bill on a monthly basis the transit rates listed in 1.1 above and will true up amounts, if any, on a quarterly basis based on actual Transit Traffic minutes per month for each month of the prior quarter.

Terri L. Hoskins
Senior Attorney

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August 1, 2007

By Messenger

FILED/ACCEPTED
AUG - 1 2007
Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Submission of Contract Pursuant to 47 U.S.C. § 211 and 47 C.F.R. § 43.51

Dear Ms. Dortch:

Pursuant to § 211 (a) of the Communications Act of 1934, as amended, and § 43.51 of the Commission's rules, AT&T hereby files the attached agreement between AT&T-13 State and New Cingular Wireless PCS, LLC. to provide Transit. If you have any questions, please do not hesitate to contact me at (202) 457-3047.

Sincerely,

/s/ Terri L. Hoskins
Senior Counsel
AT&T Services, Inc.

TRANSIT TRAFFIC SERVICE APPENDIX PRICING

1. Tiered pricing for Transit Service will be determined by the traffic volumes for transit traffic aggregated on an annual basis for 21 states including:

California
Nevada
Missouri
Oklahoma
Kansas
Arkansas
Texas
Michigan
Wisconsin
Ohio
Illinois
Indiana
Florida
Georgia
North Carolina
South Carolina
Tennessee
Kentucky
Mississippi
Louisiana
Alabama

*California Call Set Up charge 0.000629 applies in addition to the duration (MOU) rate included below as "Rates".

2. The Transit Service Rates will be as follows:

MOU Quantity	< 20B MOUs	20 – 35B MOUs	> 35B MOUs
Rates per MOU	0.0034	0.00225	0.0020

3. Pursuant to this Agreement, AT&T will bill and New Cingular Wireless PCS, LLC will pay the rate of 0.00225 for transit services, except for transit services in Connecticut (the Connecticut rates are set forth in Section 4, below). One year from the Effective Date of the Agreement, the aggregate number of transit MOUs for the 21 states listed above will be determined in order to apply the MOU Quantity Rate. If the aggregate number of transit MOUs for the 21 states is less than 20 Billion MOUs, then the 0.0034 rate will apply to the MOUs for the states that are subject to this Agreement, excluding Connecticut, ("True-Up States") and AT&T will bill and New Cingular Wireless PCS, LLC will pay a true up amount calculated as (.0034 - .00225) x the total transit MOUs for the True-Up states. If the aggregate number of transit MOUs is greater than 35 Billion MOUs for the 21 states, then the 0.002 rate will apply to the transit MOUs for the True-Up States and AT&T will true up the amount calculated as (.00225 - .0020) x the total transit MOUs for the True-Up States and apply a credit adjustment on a per BAN per state basis, unless mutually agreed otherwise. A true up will be calculated each year thereafter on the anniversary date of the last true-up.

4. Connecticut Transit Service MOUs and rates are not included in the tiered pricing included above. Transit Service MOUs in Connecticut will be calculated and billed as follows: